Office-Supreme Court,
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NOV 14 1983
ALEXANDER L. STEVA
CLERK

No. 83-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DENNIS E. GREENMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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DENNIS E. GREENMAN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

ARGUMENT

1. The central question presented by the Petition is whether a defendant who has fully performed his part of a written plea agreement, and has acted in reliance on it, is constitutionally entitled to require the Government to perform its commitments under the

agreement?* While the Government does not dispute the importance of the issue to the administration of the criminal justice system, nor the conflict between the Cooper v. United States, 598 F.2d 12 (4th Cir. 1979) and Government of Virgin Islands v. Scotland, 614 F.2d 360 (3d Cir. 1980) lines of authority (Pet. 20-26), it appears to suggest that the schism is not one of constitutional dimension because under Santobello v. New York, 404 U.S. 257 (1971), the district court "ordinarily has discretion in choosing remedies" for governmental

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* Citations to the Brief of the United States in Opposition are designated "Op. cert. ____" with appropriate page references. Citations to the Petition are designated "Pet. ___" with appropriate page references.

breach of a plea agreement (Op. cert. 6).* In fact, however, the conflict proceeds from opposing views as to whether there is a constitutional guarantee. One view finds a "constitutional right [to] be treated with fairness", Cooper v. United States, 594 F.2d 12, 16 (4th Cir. 1979), and, therefore, a "constitutional right to enforcement of a plea proposal . . . on the basis alone of reasonably formed expectations" without any showing of prejudice, 594 F.2d at

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* The Government also argues collateral factual issues, which were not considered by the Eleventh Circuit in concluding that petitioner was not entitled to specific performance. For example, it argues that the plea agreement bound only the Department of Justice and not the S.E.C. (Op. cert. 5). Counsel's request to the Sentencing Court for an evidentiary hearing on the issue was denied and the Eleventh Circuit effectively assumed that the S.E.C.'s letters were a breach of the agreement (Pet. 6a).

18;* another line finds no constitutional right to specific enforcement, at least absent a showing of unfairness or prejudice, (e.g. Government of Virgin Islands v. Scotland, 614 F.2d 360, 365 (3d Cir. 1980)); Pet. 23-25,** and a third view -- that of the Eleventh Circuit in this case -- holds, in effect, that there is no constitutional right to specific

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* Accord, Johnson v. Mabry, 707 F.2d 323, 326 (8th Cir. 1983), (petition for cert. pending, No. 83-328); ("constitutional right to enforcement of the plea bargain"); Ex Parte Yarber, No. 81-242 (Sup. Ct. Ala. March 1983) (per curiam) (same); cf. Hawaii v. Yoon, ___ Hawaii ___, 662 P.2d 1112, 1116 (Sup. Ct. Hawaii 1983) ("an unfulfilled plea agreement . . . implicates other considerations of constitutional dimension"); Pet. 21-22.

** There was prejudice here, contrary to the Government's argument (Op. cert. 6-7). Simply because a defendant "wants to" make a clean breast of his guilt or make restitution does not mean that he will do so in the absence of an acceptable plea bargain agreement.

enforcement in any circumstances.*

The Cooper court would not have denied specific enforcement in our case, as the Government implies (Op. cert. 7). As in Cooper, petitioner here was denied the benefits of a plea agreement because of the Government's conduct. The Government's reliance on the Sentencing Court's

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* The Eleventh Circuit refused to find any prejudice either in Petitioner's restitutionary payment of virtually all of his assets ($1.7 million) or in his Fifth Amendment waiver. If those acts do not constitute prejudicial reliance, it is hard to imagine what could. Further, under the Eleventh Circuit's circular reasoning, any defendant's rights to specific performance could be cut off if he refused an offer to withdraw his plea after breach by the Government. His assertion of his rights would then be deemed a re-pleading which, since it followed the breach, would be viewed as a "voluntary" plea and hence a waiver of his right to specific performance. This "assertion equals waiver" formulation appears to be limited to the Eleventh Circuit.

improper rejection of the plea agreement,* a rejection which was, in any event, disregarded by the Eleventh Circuit (Pet. 6a), is misguided because it implies that Petitioner had bargained for action by the Court. (Cf. United States v. Hammerman, 528 F.2d 326, 332 (4th Cir. 1975)). But, as in Cooper, Petitioner "bargained" for conduct by the Government -- its silence -- and the Government failed to perform. In the circumstances, Santobello presumes a constitutional impact on the sentencing environment. 404 U.S. at 262-63.

2. With regard to Petitioner's claim that the Sentencing Court was not impartial, the Government's brief does no more than repeat the words of the

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* Fed. R. Crim. P. 11(e) was amended in 1979 to eliminate the court's power to reject "type B" plea agreements such as the one at issue here.

Eleventh Circuit in concluding that the Sentencing Court's admission that he "had already made a decision as to what the sentence should be" before any allocution (Op. cert. at 9) was "merely a response to [Petitioner's] assertion of improper influence" (id; Pet. 10a). The problem with the Government's approach, and that of the Eleventh Circuit, is that it requires that we accept the Sentencing Court's statement for one purpose, but not for another. Compare Op. cert. 6 with Op. cert. 9. But if we must accept the statement as true in order to establish the Sentencing Court's freedom from influence by the S.E.C. -- because he had already decided on a sentence -- then we must accept it (absent some intervening circumstance) as a demonstration that his mind remained closed, thus denying Petitioner the required impartiality.

Conclusion

For these reasons, and those set forth in the petition, we respectfully request that this Court grant the petition for a writ of certiorari.

Dated: New York, New York
November 14, 1983

Respectfully submitted,

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